

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

GARY LOUIS CORBRAY,  
  
Petitioner,  
  
v.  
  
RON FRAKER,  
  
Respondent.

NO. CV-09-3034-EFS

**ORDER DISMISSING HABEAS PETITION  
AND ENTERING JUDGMENT IN  
RESPONDENT'S FAVOR**

Before the Court are Petitioner Gary Louis Corbray's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("the Petition") (Ct. Rec. [12](#)), Motion for Evidentiary Hearing (Ct. Rec. [3](#)), and Motions to Submit Witness List (Ct. Recs. [5](#) & [22](#)). Mr. Corbray challenges his March 4, 2005 convictions for first-degree child molestation on the grounds that 1) he was denied effective assistance of counsel at trial and on appeal, 2) testimony was unconstitutionally admitted at trial, 3) his right to a speedy trial was violated, and 4) his constitutional right to an impartial jury was violated. Respondent Ron Fraker opposes the Petition, contending that the claims are procedurally barred because 1) Mr. Corbray failed to fairly present his federal claims to the state courts and 2) the state courts applied an independent and adequate state procedural rule. (Ct. Rec. [18](#).) After reviewing the submitted material and relevant authority, the Court is

1 fully informed and dismisses the Petition for the reasons set forth  
2 below.

3 **A. Procedural Background**

4 A jury convicted Mr. Corbray of first-degree child molestation in  
5 Yakima County Superior Court. He was sentenced to an indeterminate  
6 sentence with a maximum term of life and a minimum term of fifty-eight  
7 (58) months confinement. (Ct. Rec. 20 Ex. 1.) Counsel, on Mr.  
8 Corbray's behalf, filed a direct appeal on January 13, 2006. *Id.* Ex. 4.  
9 On February 1, 2006, Mr. Corbray supplemented this appeal. *Id.* Ex. 5.  
10 On September 7, 2006, the Washington Court of Appeals' Commissioner  
11 denied the appeal. *Id.* Ex. 3. Mr. Corbray's counsel filed a Motion to  
12 Modify the Commissioner's Ruling, *id.* Ex. 8; this motion was denied, *id.*  
13 Ex. 9. On January 22, 2007, Mr. Corbray filed pro se a Motion for  
14 Discretionary Review with the Washington Supreme Court. *Id.* Ex. 11.  
15 Because no action was taken by the Washington Supreme Court, the Court  
16 of Appeals' decision became final on March 7, 2007. *Id.* Ex. 14.

17 Mr. Corbray then filed a Personal Restraint Petition (PRP) with the  
18 Washington Court of Appeals on November 16, 2007. *Id.* Exs. 15 & 16.  
19 The Court of Appeals dismissed the PRP. *Id.* Ex. 18-B. On October 30,  
20 2008, Mr. Corbray filed a Motion for Discretionary Review with the  
21 Washington Supreme Court. *Id.* Ex. 19. The Washington Supreme Court  
22 denied review. *Id.* Ex. 20.

23 Mr. Corbray filed his habeas petition on March 23, 2009. (Ct. Rec.  
24 [1](#).) On June 15, 2009, Respondent filed his response, along with a copy  
25 of the state court record. (Ct. Rec. [18](#).) Mr. Corbray filed a reply on  
26 July 7, 2009. (Ct. Rec. [21](#).)

1 **B. Standard**

2 A person in custody pursuant to a state court judgment can request  
3 that a federal court determine whether his custody is in violation of  
4 the U.S. Constitution. 28 U.S.C. § 2254. One requirement, however, is  
5 that the petitioner must exhaust available state court remedies. *Id.* §  
6 2254(b)(1); *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (requiring  
7 state court to have opportunity to address and correct alleged  
8 violations of the prisoner's federal rights). In addition, this Court  
9 may not consider the merits of a federal constitutional claim if the  
10 Washington Supreme Court denied collateral relief based on an  
11 independent state procedural ground. See *Murray v. Carrier*, 477 U.S.  
12 478, 492 (1986). Further, to be successful, the petitioner must show  
13 that the state court decision 1) was contrary to, or involved an  
14 unreasonable application of, clearly established federal law, or 2)  
15 resulted in a decision that was based on an unreasonable determination  
16 of the facts in light of the evidence presented in the state court  
17 proceedings.<sup>1</sup> 28 U.S.C. § 2254(d).

18 **C. Analysis**

19 1. Claim 1: Ineffective Assistance of Counsel

20 Mr. Corbray argues that his constitutional right to effective  
21 assistance of counsel was violated at the trial stage and on appeal.  
22 Respondent argues that this claim is procedurally barred because the  
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24 <sup>1</sup> The state court ruling is presumed correct and the petitioner has  
25 the burden of rebutting the presumption of correctness by clear and  
26 convincing evidence. *Id.* § 2254(e)(1); *McKenzie v. McCormick*, 27 F.3d  
27 1415, 1418-19 (9th Cir. 1994).

1 Washington Supreme Court declined to review the merits of Mr. Corbray's  
2 ineffective assistance of counsel claim, relying on a state procedural  
3 rule.

4 If the Washington Supreme Court dismissed a collateral attack upon  
5 a criminal conviction based on an independent and adequate state  
6 procedural rule, this Court cannot consider the merits of a federal  
7 constitutional claim unless cause and actual prejudice are shown. See  
8 *Murray v. Carrier*, 477 U.S. 478, 492 (1986); *Anselmo v. Sumner*, 882 F.2d  
9 431, 431 (9th Cir. 1989). In order to constitute an independent and  
10 adequate state procedural rule, the state rule must 1) not be  
11 "interwoven with the federal law," *Michigan v. Long*, 463 U.S. 1032,  
12 1040-41 (1983), and 2) be clear, consistently applied, and well-  
13 established at the time of Mr. Corbray's purported default, see *Wells v.*  
14 *Maas*, 28 F.3d 1005, 1010 (9th Cir. 1994). Also, the Washington Supreme  
15 Court must have "clearly expressed in a 'plain statement' its reliance"  
16 on the state procedural rule as the reason to deny collateral relief.  
17 *Anselmo*, 882 F.2d at 433 (quoting *Harris v. Reed*, 489 U.S. 255, 263  
18 (1989)).

19 Here, the Washington Supreme Court on collateral review stated the  
20 following in relation to Mr. Corbray's arguments that trial and  
21 appellate counsel were ineffective:

22 Mr. Corbray bases . . . [this claim] on conclusory allegations  
23 unsupported by any citation to the record or to admissible  
24 evidence. This is not sufficient. In re Pers. Restraint of  
Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

25 (Ct. Rec. 20 Ex. 20 p. 2.) *In re Rice*, which is based on Washington  
26 Rule of Appellate Procedure 16.7(a)(2)(i), is not interwoven with  
27 federal law. Plus, it is a procedural bar that has been clearly and

1 consistently applied before and following Mr. Corbray's clearly-  
2 expressed default. See *Williams v. Payne*, 2006 WL 3469603, \*3 (W.D.  
3 Wash. Nov. 29, 2006). Therefore, the Washington Supreme Court dismissed  
4 Mr. Corbray's ineffective assistance of counsel claims based on an  
5 independent and adequate state procedural rule.

6 The Court may nevertheless review this procedurally-barred federal  
7 claim if Mr. Corbray can "demonstrate cause for the default and actual  
8 prejudice as a result of the alleged violation of federal law, or  
9 demonstrate that failure to consider the claims will result in a  
10 fundamental miscarriage of justice."<sup>2</sup> *Coleman v. Thompson*, 501 U.S. 722,  
11 750 (1991). The Court finds that Mr. Corbray failed to so demonstrate.  
12 Accordingly, Mr. Corbray is barred from asserting his ineffective  
13 assistance of counsel claims.

14 2. Claim 2: Unconstitutionally Admitted Trial Testimony

15 Mr. Corbray also argues that the trial court improperly admitted  
16 Officer Kimberly Hipner's testimony because she destroyed notes from an  
17 interview with Mr. Corbray during which Mr. Corbray alleges he requested  
18 counsel. Respondent contends that this claim is unreviewable because  
19 Mr. Corbray failed to present it to both state appellate courts either  
20 on direct or collateral review, i.e., he failed to exhaust available  
21 state remedies.

22 The exhaustion doctrine provides that habeas relief must be denied  
23 if the petitioner has not "exhausted the remedies available in the  
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25 <sup>2</sup> "'Cause' is a legitimate excuse for the default, and 'prejudice'  
26 is actual harm resulting from the alleged constitutional violation."  
27 *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1991).

1 courts of the State." 28 U.S.C. § 2254(b)(1)(A); see *Muhammad v. Close*,  
2 540 U.S. 749, 751 (2004). In order to exhaust available state court  
3 remedies, the habeas petitioner must "fairly present" his federal claim  
4 to each appropriate state court. *Baldwin v. Reese*, 541 U.S. 27, 29  
5 (2004). Washington provides two avenues of relief for state prisoners:  
6 direct appeal and collateral review through a personal restraint  
7 petition. See *Washington v. McFarland*, 127 Wn.2d 322, 335 (1995). The  
8 Court finds that the exhaustion requirement, which serves the law of  
9 comity, is satisfied when an issue is "fairly presented" to both the  
10 state court of appeals and supreme court during either the direct appeal  
11 or the personal restraint petition.

12 In order to fairly present a federal claim, it must be raised in  
13 the petition or brief. *Baldwin*, 541 U.S. at 32. Further, the  
14 petitioner must describe both the operative facts and the federal legal  
15 theory on which his claim is based. *Davis v. Silva*, 511 F.3d 1005, 1009  
16 (9th Cir. 2008). The petitioner can raise the federal legal theory by  
17 citing to a federal constitutional provision, a federal statute, or  
18 citing to federal case law, or simply labeling the claim "federal." *Id.*  
19 at 1011. A limited exception to the requirement that the federal claim  
20 be presented to both state appellate courts exists if the state's  
21 highest court reaches the merits of the federal claim. *Castille v.*  
22 *Peoples*, 489 U.S. 346, 351 (1989); *Ylst v. Nunnemaker*, 501 U.S. 797, 801  
23 (1991).

24 In connection with the direct appeal, Mr. Corbray argued to the  
25 Washington Court of Appeals that the trial court erred in admitting his  
26 pretrial statements; however, neither his briefs addressed destruction  
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1 of evidence by Officer Hipner, nor did the Court of Appeals' analysis  
2 discuss destruction of evidence. Even if the Court reads Mr. Corbray's  
3 wrongful admission argument broadly, neither counsel nor Mr. Corbray  
4 cited to federal law. (Ct. Rec. 20 Exs. 4 & 5.) Mr. Corbray also  
5 failed to present this argument to the Washington Supreme Court on  
6 direct review. *Id.* Ex. 11.

7 In his Court of Appeals' PRP submission, Mr. Corbray alleged that  
8 Officer Hipner destroyed and rewrote evidence. *Id.* Ex. 16 pp. 22 & 36.  
9 In connection with this argument, Mr. Corbray cited to federal case law  
10 and constitutional standards. *Id.* Ex. 16 pp. 36-37. Yet, in his PRP  
11 brief to the Washington Supreme Court, Mr. Corbray only cited to  
12 Washington law when arguing that his statements made to Officer Hipner  
13 were unlawfully admitted. And in addressing this argument, the  
14 Washington Supreme Court relied only upon Washington law. *Id.* Ex. 20  
15 p. 1.

16 Accordingly, the Court finds that Mr. Corbray failed to fairly  
17 present to both state appellate courts during either direct or  
18 collateral review his argument that the trial court improperly admitted  
19 Officer Hipner's testimony because she destroyed interview notes;  
20 therefore, the exhaustion doctrine applies.

21 Because more than one year has passed since Mr. Corbray's  
22 conviction became final on March 19, 2007, his claim is now time-barred  
23 in state court given that there are no facts alleged that would  
24 establish cause and prejudice or extraneous circumstances that prevented  
25 Mr. Corbray from raising this claim in his timely-filed personal  
26 restraint petition. RCW 10.73.090(1) & 10.73.140; Wash. Rule of App.  
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1 Proc. 16.4(d); see *Coleman*, 501 U.S. at 750. Furthermore, Mr. Corbray  
2 presented no evidence demonstrating actual innocence. See *Schulup v.*  
3 *Delo*, 513 U.S. 298, 327-29 (1995). For these reasons, the Court  
4 dismisses Mr. Corbray's second federal claim.

5 3. Claim 3: Speedy Trial Violation

6 Mr. Corbray also contends that his federal right to a speedy trial  
7 was violated because of trial counsel's numerous continuance requests.  
8 Respondent argues that this claim is procedurally barred under *In re*  
9 *Rice*, 118 Wn.2d at 886. The Court agrees. Like Mr. Corbray's  
10 ineffective assistance of counsel claims, the Washington Supreme Court,  
11 citing to *In re Rice*, denied collateral review of Mr. Corbray's speedy  
12 trial violation arguments because he failed to support his conclusory  
13 allegations with any citation to the record or admissible evidence.  
14 (Ct. Rec. 20 Ex. 20 p. 2.) Mr. Corbray failed to demonstrate cause for  
15 his procedural default, resulting prejudice, or a fundamental  
16 miscarriage of justice. Accordingly, the Court finds that Mr. Corbray  
17 is procedurally barred from asserting speedy trial violation arguments  
18 in this habeas petition.

19 4. Claim 4: Impartial Jury

20 Mr. Corbray contends that his due process right to be tried by an  
21 unbiased jury was violated. Respondent argues that dismissal of this  
22 claim is required because Mr. Corbray failed to fairly present this as  
23 a federal claim to both state appellate courts during either direct or  
24 collateral review.

25 In his direct appeal brief to the Washington Court of Appeals, Mr.  
26 Corbray asserted facts to support his argument that he was denied a fair  
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1 trial; he did not, however, cite to federal law. (Ct. Rec. 20 Ex. 5.)  
2 Nonetheless, the Washington Court of Appeals recognized that both the  
3 U.S. and Washington Constitutions convey the right to a fair and  
4 impartial jury in any criminal proceeding. U.S. Const. amend. VI. Yet,  
5 Mr. Corbray did not argue that he was denied a fair trial because of a  
6 biased jury in his brief to the Washington Supreme Court on direct  
7 review. (Ct. Rec. 20 Ex. 11.) Accordingly, Mr. Corbray did not fairly  
8 present this claim to both state appellate courts during direct review.

9 In his PRP brief to the Washington Court of Appeals, Mr. Corbray  
10 argued that he was denied the right to an impartial jury and cited to  
11 the U.S. Constitution and Fifth and Sixth Amendments and to federal  
12 cases. *Id.* Ex. 16 pp. 34 & 35. The Court of Appeals, however, did not  
13 consider this argument, stating "[t]his court will not review issues  
14 previously raised and rejected in a direct appeal unless the petitioner  
15 can show that reexamination of the issues will serve the ends of  
16 justice," citing to *In re Gentry*, 137 Wn.2d 378, 388 (1999). (Ct. Rec.  
17 20 Ex. 18-B p. 2.)

18 In his PRP motion for discretionary review with the Washington  
19 Supreme Court, Mr. Corbray cited to *Field v. Brown*, 503 F.3d 755, 779  
20 (9th Cir. 2007), and referred to a defendant's right to an impartial  
21 jury. (Ct. Rec. 20 Ex. 19 p. 16.) The Supreme Court also did not  
22 address the merits of this argument, stating: "[Mr. Corbray] does  
23 support the juror bias claim with a portion of the trial transcript, but  
24 the Court of Appeals considered and rejected this claim on direct  
25 appeal. Mr. Corbray does not show that the interests of justice require  
26 reconsideration of this issue. *Lord*, 123 Wn.2d at 303." *Id.* Ex. 20  
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1 p. 2. The Court finds that the Washington Supreme Court clearly relied  
2 on an independent and adequate state procedural rule to deny Mr. Corbray  
3 collateral relief on this claim.<sup>3</sup>

4 Accordingly, because 1) Mr. Corbray did not raise this claim to the  
5 Washingtgn Supreme Court on direct appeal and 2) the Washington Supreme  
6 Court relied upon an independent and adequate state procedural rule  
7 during the collateral proceeding, the Court dismisses Mr. Corbray's  
8 fourth claim - violation of his federal constitutional right to an  
9 unbiased jury.

10 5. Other Requests

11 Mr. Corbray asks the Court to set a hearing and to require  
12 disclosure of witnesses. Because the Court has determined that Mr.  
13 Corbray's claims are procedurally barred as a result of the application  
14 of state procedural rules and failure to exhaust available state  
15 remedies, an evidentiary hearing and disclosure of witnesses are not  
16 required. See *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998).

17 **D. Conclusion**

18 Accordingly, **IT IS HEREBY ORDERED:**

19 1. Mr. Corbray's Petition Under 28 U.S.C. § 2254 for Writ of  
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21 <sup>3</sup> Washington "take[s] seriously the view that a collateral attack  
22 by PRP on a criminal conviction and sentence should not simply be  
23 reiteration of issues finally resolved at trial and direct review, but  
24 rather should raise new points of fact and law that were not or could  
25 not have been raised in the principal action, to the prejudice of the  
26 defendant." *In re Gentry*, 137 Wn.2d at 388-89; see also *In re Lord*, 123  
27 Wn.2d 296 (1994).

1 Habeas Corpus by a Person in State Custody (Ct. Rec. 12) is **DISMISSED**.

2 2. Mr. Corbray's Motion for Evidentiary Hearing (Ct. Rec. 3) and  
3 Motions to Submit Witness List (Ct. Recs. 5 & 22) are **DENIED AS MOOT**.

4 3. Judgment shall be entered in Respondent's favor.

5 4. This file shall be **CLOSED**.

6 **IT IS SO ORDERED.** The District Court Executive is directed to  
7 enter this Order and forward a copy to Petitioner and counsel.

8 **DATED** this 3<sup>rd</sup> day of August 2009.

9  
10 S/ Edward F. Shea  
11 EDWARD F. SHEA  
12 UNITED STATES DISTRICT JUDGE

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